

51 N.J.R. 1537(a)

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RULE ADOPTIONS

Reporter

51 N.J.R. 1537(a)

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Agency

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Administrative Code Citation

Adopted Amendments: N.J.A.C. 19:30-6.1 and 19:31-3.1, 3.2, 3.3, 3.4, and 3.5

Text

Administrative Rules; Fees; Authority Assistance Programs; Direct Loan Program

Proposed: June 3, 2019, at 51 N.J.R. 820(a).

Adopted: September 13, 2019, by the New Jersey Economic Development Authority, Tim Sullivan, Chief Executive Officer.

Filed: September 13, 2019, as R.2019 d.111, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 34:1B-1 et seq.

Effective Date: October 7, 2019.

Expiration Date: May 8, 2025.

Summary of Public Comments and Agency Responses:

One comment was submitted by Grant Lucking, VP of Environmental Affairs, New Jersey Builders Association (NJBA).

COMMENT: NJBA strongly supports the increase in the maximum amount of financing available from \$ 750,000 to \$ 5,000,000 to help actualize remediation projects with funding gaps. The remediation and revitalization of brownfield sites has substantial environmental, economic, and social benefits.

RESPONSE: The Economic Development Authority (EDA) thanks the NJBA for its support of the increase in financing available under the Brownfields Loan Program.

COMMENT: NJBA believes the Brownfields Loan Program should not require a letter of support from the mayor of the municipality, provided that all appropriate preliminary approvals have been received from the municipality. NJBA notes that not all municipalities are required to have mayors, for instance, under the 1923 Municipal Manager Form of Government (N.J.S.A. 40-39.1 et seq.). Additionally, development approvals are not subject to mayoral approval. This requirement could delay or otherwise prevent the revitalization and remediation of brownfield sites.

RESPONSE: In recognition of the variable forms of municipal government in New Jersey, as noted by the commenter, the EDA has changed N.J.A.C. 19:31-3.3(c)9i to add "or the governing body if the position of mayor does not exist" pursuant to the municipality in which the brownfield site is located.

COMMENT: In several instances, the notice of proposal requires the submission of an "environmental report" from a Licensed Site Remediation Professional (LSRP). The term "environmental report" is undefined and clarification should be provided regarding the extent of information an LSRP is required to provide. Additionally, at proposed new N.J.A.C. 19:31-3.3(c)9, it is unclear what type of professionals the requirement for environmental reports applies to.

RESPONSE: The EDA will change N.J.A.C. 19:31-3.2(c)2 and 3.3(c)9iv and v to address the concerns presented by the commenter. N.J.A.C. 19:31-3.2(c)2 is changed to delete the terms "required" and "report" pertaining to the licensed site remediation professional; and, delete the terms "other documentation from" and to modify the term qualified professional to add "other than a licensed site remediation professional" and "or the structure is a contaminated building" pertaining to a structure.

N.J.A.C. 19:31-3.3(c)9iv is changed to indicate any report (not just an environmental report) and to replace "applicable New Jersey Department of Environmental Protection requirements," with "pursuant to the Technical Requirements for Site Remediation at N.J.A.C. 7:26E" to specifically add what the applicable requirements are. N.J.A.C. 19:31-3.3(c)9v is changed to indicate any report (not just an environmental report) that demonstrates the structure is a contaminated building, as determined on a case-by-case basis.

COMMENT: Proposed new N.J.A.C. 19:31-3.1(i)7i permits the EDA to reduce the rate of interest if, "[t]he redevelopment project has been designed as a mixed-use residential project consisting of newly-constructed residential units where the developer will reserve at least 20 percent, but not more than 50 percent, of the residential units constructed for occupancy by low- and moderate-income households with affordability controls as required under the rules of the Council on Affordable Housing." NJBA believes that this subparagraph should be modified to also include projects that are 100 percent residential and not only projects that are mixed-use residential.

RESPONSE: The proposed modification to include projects that are 100 percent residential, and therefore, without a commercial end use, does not comply with the provisions of the EDA's enabling statute, N.J.S.A. 34:1B-1 et seq.

COMMENT: The definition for "brownfields site" at proposed new N.J.A.C. 19:31-3.2(c)1i should be amended to remove the reference to mixed-use residential development to enable additional types of development projects on sites requiring further remediation. Expanding the pool of potential projects types will further encourage the remediation of brownfield sites.

RESPONSE: The EDA declines to remove the reference to mixed-use residential development in the definition of "brownfields site" to enable additional types of development, as EDA assistance for non-mixed-use residential development is not authorized under the provisions of the EDA's enabling statute, N.J.S.A. 34:1B-1 et seq.

COMMENT: Proposed new N.J.A.C. 19:31-3.2(c)5 requires that the future use of the brownfield site shall be commercial use or mixed-use. NJBA believes this should be amended to include residential projects to further encourage the remediation of brownfields loan applicants under this program.

RESPONSE: The EDA declines to revise the requirement at proposed new N.J.A.C. 19:31-3.2(c)5 to include residential projects which, without a commercial component, is precluded under the EDA's enabling statute, N.J.S.A. 34:1B-1 et seq.

COMMENT: N.J.A.C. 19:31-3.1(f) is proposed for amendment and stipulates that not more than 20 percent of the loan may be used for soft costs. NJBA does not believe there should be a limit on soft costs as engineering and professional fees associated with development and remediation could be a substantial percentage of project costs, particularly in the case of smaller projects.

RESPONSE: The proposed requirement that not more than 20 percent of the Brownfields loan may be used for soft costs is consistent with existing EDA policy to ensure that the amount of reimbursement for any costs not directly related to construction, including fees and taxes, be limited to a fair and reasonable amount.

Federal Standards Statement

The adopted amendments are not subject to, nor exceed, any Federal requirements or standards, particularly under 26 U.S.C. § 1400Z-1 and 1400Z-2 as referenced in the adopted amendments.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks ***thus***; deletions from proposal indicated in brackets with asterisks *[thus]*):

CHAPTER 30
ADMINISTRATIVE RULES

SUBCHAPTER 6. FEES

19:30-6.1 Application fee

(a) Except as set forth in (c) and (d) below, a non-refundable fee of \$ 1,000 shall accompany every application for Authority assistance, except for:

1.-2. (No change.)

3. An application for assistance under the Small Business Fund and N.J.S.A. 34:1B-47 et seq., for which the fee is \$ 300.00;

4. An application for assistance under the Real Estate Impact Fund, for which the fee is \$ 2,500; and the full amount of direct costs of any analysis by a third-party retained by the Authority, if the Authority deems such retention to be necessary, shall be paid; and

5. An application for assistance under the Brownfields Loan Program, for which the fee is \$ 2,500; and the full amount of direct costs of any analysis by a third-party retained by the Authority, if the Authority deems such retention to be necessary, shall be paid by the applicant prior to the Authority's decision on the application.

(b)-(d) (No change.)

CHAPTER 31
AUTHORITY ASSISTANCE PROGRAMS
SUBCHAPTER 3. DIRECT LOAN PROGRAM

19:31-3.1 Program description

(a) (No change.)

(b) Except as otherwise provided in this subsection, direct loans are available in a maximum amount of \$ 2,000,000 for fixed asset financing and \$ 750,000 for working capital.

1. (No change.)

2. For the Brownfields Loan Program, the maximum loan amount will be \$ 5,000,000 and the minimum shall be \$ 100,000.

3.-8. (No change.)

(c)-(e) (No change.)

(f) Proceeds of Brownfields loans shall be used for financing those costs not duplicative of other approved State or Federal grants previously awarded for the proposed use of funds and associated with the remediation project, including, but not limited to: soil, groundwater, and infrastructure investigation, assessment, and remediation; abatement; hazardous materials or waste disposal; long-term groundwater remediation, natural attenuation, or other forms of engineering and institutional controls; building and structural remedial activities, including, but not limited to, demolition, asbestos abatement, polychlorinated biphenyl removal, contaminated wood or paint removal, or other infrastructure remedial activities; attorney fees; and planning, engineering, and environmental consulting. Not more than 20 percent of the brownfields loan may be used for soft costs.

(g)-(h) (No change.)

(i) The Authority shall determine the term, and fixed and/or variable rates of interest, including interest rate floors, to be charged for each loan product through consideration and official action of the Members at a public hearing. The applicant shall elect in writing, at or prior to the time of closing, a fixed interest rate or a variable interest rate.

1.-6. (No change.)

7. For Brownfields loans, full repayment shall be due and payable to the Authority at the earlier of the end of the loan term or upon closing of construction financing. The interest shall be fixed and shall be determined by the economic feasibility and economics pertaining to the return on investment and the ability to attract the required investment. The Authority, at its sole discretion, may reduce the rate of interest based on factors associated with the redevelopment project's projected societal benefits and contribution to the economic development of the municipality and the areas to be affected by the redevelopment project as determined by a review of the redevelopment project design; such factors may include, but are not limited to:

i. The redevelopment project has been designed as a mixed-use residential project consisting of newly-constructed residential units where the developer will reserve at least 20 percent, but not more than 50 percent, of the residential units constructed for occupancy by low- and moderate-income households with affordability controls as required under the rules of the Council on Affordable Housing;

ii. The brownfield site is in an urban food desert community and the redevelopment project design includes a food delivery source, which means access to nutritious foods, such as fresh fruits and vegetables, through grocery operators, including, but not limited to, a full-service supermarket or grocery store, or other healthy food retailers of at least 10,000 square feet, including, but not limited to, a prepared food establishment selling primarily nutritious ready-to-serve meals;

iii. The redevelopment project design includes a health care or health services center with a minimum of 10,000 square feet of space devoted to primary health care or health services and is located in a distressed municipality with a Municipal Revitalization Index score of 50 or lower;

iv. The redevelopment project has been designed as a tourism destination project, which means a non-gaming business facility that will be among the most visited privately owned or operated tourism or recreation sites in the State, and which has been determined by the Authority to be located in an area appropriate for development and in

need of economic development incentive assistance. A tourism destination project shall include a non-gaming business facility within an established tourism district with a significant impact on the economic viability of that district;

v. The redevelopment project design includes an electric vehicle charging station installation in at least 25 percent of the parking spaces to be located at the redevelopment project;

vi. The applicant demonstrates to the Authority that the parking area to be located at the redevelopment project is capable of conversion to commercial space if there is a decrease in demand for parking; and/or

vii. The redevelopment project has been designed to include an incubator facility or collaborative workspaces.

8. (No change in text.)

(j)-(k) (No change.)

19:31-3.2 Eligibility standards

(a)-(b) (No change.)

(c) For brownfields loans:

1. The following words and terms, when used in this subchapter, shall have the following meanings only for purposes of the Brownfields Loan Program, unless the context clearly indicates otherwise:

i. "Brownfields site" means any former or current commercial or industrial site that is currently vacant or underutilized and on which there has been, or there is suspected to have been, a discharge of a contaminant or on which there is a contaminated building or which has been remediated for industrial use, but requires further remediation for mixed-use residential development.

ii. "Contaminated building" means a structure for which abatement or removal of asbestos, polychlorinated biphenyls, contaminated wood or paint, and other infrastructure remedial activities is necessary.

iii. "Contamination" or "contaminant" means any discharged hazardous substance as defined pursuant to section 3 of P.L. 1976, c. 141 (N.J.S.A. 58:10-23.11b), hazardous waste as defined pursuant to section 1 of P.L. 1976, c. 99 (N.J.S.A. 13:1E-38), or pollutant as defined pursuant to section 3 of P.L. 1977, c. 74 (N.J.S.A. 58:10A-3).

iv. "Equity" means cash, development fees, costs for remediation and redevelopment project feasibility incurred within the 12 months prior to application, property value less any mortgages or liens, and the portion of the developer's fee that is delayed for a minimum of five years, and any other investment by the developer in the remediation or redevelopment project deemed acceptable by the Authority in its sole discretion but shall not include Federal, State, and local grants or Federal and State tax credits.

v. "Licensed site remediation professional" means an individual who is licensed by the Site Remediation Professional Licensing Board pursuant to section 7 of P.L. 2009, c. 60 (N.J.S.A. 58:10C-7) or the Department of Environmental Protection pursuant to section 12 of P.L. 2009, c. 60 (N.J.S.A. 58:10C-12).

vi. "Local governmental redeveloper" means a municipal government, a municipal parking authority, a redevelopment agency acting on behalf of a municipal government as defined in section 3 of P.L. 1992, c. 79 (N.J.S.A. 40A:12A-3), a county improvement authority established pursuant to P.L. 1960, c. 183 (N.J.S.A. 40:37A-44 et seq.), or any subdivision, department, agency, or instrumentality of a county or municipality that is authorized to complete the remediation and redevelopment of a brownfield site.

vii. "Redevelopment project" means the specific construction project or improvement, including lands, buildings, improvements, real and personal property or any interest therein, including lands under water, riparian rights, space rights, and air rights, acquired, owned, leased, developed or redeveloped, constructed, reconstructed, rehabilitated

or improved, undertaken by a developer, owner, or tenant, or both, at the brownfield site upon completion of the remediation project.

viii. "Remediation," "remediate," or "remedial activities" means all necessary actions to investigate and clean up or respond to any known, suspected, or threatened discharge of contaminants, including, as necessary, the preliminary assessment, site investigation, remedial investigation, and remedial action, as those terms are defined in section 23 of P.L. 1993, c. 139 (N.J.S.A. 58:10B-1), provided, however, that "remediation," "remediate," and "remedial activities" shall not include the payment of compensation for damage to, or loss of, natural resources.

ix. "Remediation project" or "project" means the investigation, assessment, and remediation of a brownfield site.

2. Applicants shall include potential purchasers or current owners of a brownfield site, including local governmental redevelopers, and shall not include individuals or entities responsible for, or individuals or entities who have common ownership or control with entities responsible for, any existing environmental contamination at the site or any individuals or entities that have indemnified a responsible party or a party who has common ownership or control with a responsible party. The applicant shall demonstrate to the Authority's satisfaction through the **[required]** licensed site remediation professional **[report]** or, as applicable for a structure, **[other documentation from]** a qualified professional ***other than a licensed site remediation professional*** that the site is a brownfield site ***or the structure is a contaminated building***;

3. Demonstrate site control or a path to site control for the brownfield site;

4. The brownfield site, in a remediated condition, shall have an appraised value equal to or greater than 100 percent of all debt financing, including the requested brownfields loan amount, unless the applicant can demonstrate other sources of collateral to the Authority's satisfaction;

5. Future use of the site shall be commercial, including, but not limited to, manufacturing and retail, or mixed use.

6. The applicant shall demonstrate the following to the Authority's satisfaction and based on the Authority's analysis, taking into account the costs of the remediation project:

i. The redevelopment project is economically feasible, meaning there is enough cash flow to repay debt financing, including the brownfields loan; and

ii. The redevelopment project has a funding gap, which shall be supported by a certification from the applicant that after making all good faith efforts to raise additional capital, additional capital cannot be raised from other sources;

7. Applications shall meet a minimum score and may be prioritized or selected in competitive rounds based on criteria that considers factors related to the economic distress of the municipality and the benefits of the proposed redevelopment project to the municipality and the State, including, but not limited to:

i. The applicant is a non-profit entity;

ii. The level of economic distress in the municipality as determined by the brownfield site being located in one of the 50 most distressed municipalities in the Municipal Revitalization Index, in an eligible Opportunity Zone pursuant to 26 U.S.C. § 1400Z-1 and 1400Z-2, or in a municipality serviced by the New Jersey Department of Environmental Protection Community Collaborative Initiative;

iii. Investment received through a fund qualifying under 26 U.S.C. § 1400Z-1 and 1400Z-2, or engagement and collaboration with the Department of Environmental Protection Community Collaborative Initiative;

iv. The brownfields site is located in Planning Area 1 (Metropolitan) pursuant to the State Planning Act, P.L. 1985, c. 398 (N.J.S.A. 52:18A-196 et seq.) and within a one-half mile radius, with bicycle and pedestrian connectivity, to the mid-point of a New Jersey Transit Corporation, Port Authority Transit Corporation, or Port Authority Trans-Hudson Corporation rail, bus, or ferry station, including all light rail stations, or a high frequency bus stop as certified by the New Jersey Transit Corporation;

- v. The proposed plan for the reuse of the brownfield site is consistent with applicable local redevelopment plans;
- vi. The amount of the projected new tax revenues generated from the proposed use of the brownfield site;
- vii. The need of the loan to the viability of the remediation project and the redevelopment project;
- viii. The public health and environmental benefits of the proposed redevelopment project, in addition to the remediation of the brownfield site; and
- ix. The length of time the brownfield site has been abandoned or underutilized;

8. Remediation projects previously approved for reimbursement through the Brownfields and Contaminated Site Remediation Reimbursement Program are not eligible. Remediation projects that have not received any assistance from the Brownfields and Contaminated Site Remediation Program are eligible for a Brownfields loan provided that the loan is used for separate uses other than the reimbursement assistance.

(d)-(e) (No change.)

19:31-3.3 Application procedures

(a)-(b) (No change.)

(c) A completed Application includes:

1.-6. (No change.)

7. A list of the applicant's five largest suppliers, including the supplier name, address, telephone number, and contact person;

8. A schedule of all officers, directors, and stockholders (owning 10 percent or more of the stock), including resumes and signed, dated personal financial statements; and

9. For the Brownfields Loan Program, applications shall be accompanied by:

i. A letter of support from the mayor ***or the governing body if the position of mayor does not exist*** of the municipality in which the brownfield site is located;

ii. In the case of municipalities making application, all approvals required by the Local Finance Board in the Division of Local Government Services, Department of Community Affairs;

iii. A plan for the redevelopment project, specifically including the proposed reuse of the brownfield site and a description of the relation of the reuse plan to applicable local redevelopment plan, zoning, and land use;

iv. A completed ***[environmental]*** report prepared by a licensed site remediation professional pursuant to ***[applicable New Jersey Department of Environmental Protection requirements]*** ***N.J.A.C. 7:26E, Technical Requirements for Site Remediation***; and

v. Any applicable ***[environmental]*** report prepared by other qualified professionals ***[pertaining to any]*** ***that demonstrates that the*** structure on the brownfield site ***is a contaminated building***.

(d)-(e) (No change.)

19:31-3.4 Evaluation process

(a) (No change.)

(b) After completing (a) above, a determination is made as to the merits of the request, the likelihood of repayment, and the adequacy of the collateral available to secure the requested financing. For a brownfields loan, the determination of the amount of the loan shall also be based on the amount of the funding gap.

(c) (No change.)

19:31-3.5 Approval process

(a)-(c) (No change.)

(d) If there has been no veto, a formal commitment letter is issued to the applicant.

1. The commitment letter contains all terms, conditions, and collateral required by the Authority. As applicable, direct loans are subject to the Authority's affirmative action requirements, P.L. 1979, c. 203 (N.J.S.A. 34:1B-5.4), and prevailing wage requirements, P.L. 2007, c. 245 (N.J.S.A. 34:1B-5.1).

2. With the exception of the New Jersey Growth Fund, the Edison Innovation Angel Growth Fund, the Edison Innovation VC Growth Fund, the Edison Innovation Growth Stars Fund, and the Brownfields Loan Program, usually, life insurance on the applicant's principal officer(s) is required in an amount equal to the Authority's guarantee. The life insurance must name the Authority as a collateral assignee.

3. With the exception of the New Jersey Growth Fund, the Edison Innovation Angel Growth Fund, the Edison Innovation VC Growth Fund, the Edison Innovation Growth Stars Fund, and the Brownfields Loan Program, personal guarantees of owners of 10 percent or more of the applicant are usually required, and there may be a requirement for collateral apart from the applicant's collateral to secure the personal guarantees.

4. For the Brownfields Loan Program, applicants are required to:

i. As a condition to closing:

(1) Provide documentation of owner equity equal to a minimum of 10 percent of the appraised value of the brownfield site in a remediated state; and

(2) Demonstrate site control, which includes the ability to perform the remediation and redevelopment projects, grant a lien on the brownfield site as collateral to the Authority if applicable, and record the deed restriction in (d)4iii below.

ii. Upon closing, record a deed restriction that requires that for 10 years after completion of the remediation project, any redevelopment project on the brownfield site shall be consistent with the proposed use and the factors considered to determine eligibility, rate of interest, or other benefits under the Brownfields Loan Program.

iii. Ensure that the Authority's affirmative action and prevailing wage requirements shall apply to the remediation project and the redevelopment project.

iv. Prior to final disbursement, provide evidence that the remediation project is completed. There shall be no requirement for the applicant to complete the redevelopment project.

(e)-(f) (No change.)